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No. 08-971

IN THE

Supreme Court of the United States

ROBERT SIMPSON RICCI, et al.,
Petitioners,

v.

DEVAL L. PATRICK, in his capacity as Governor of the Commonwealth of Massachusetts, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* VOICE OF THE RETARDED IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Voice of the Retarded, Inc. ("VOR") is a nationwide advocacy organization dedicated to ensuring that individuals with mental retardation receive the care and support they need in a setting appropriate to fulfill those needs.[1] A corollary objective is to advance family participation in the choice of treatment options, with the decisions of the disabled person and his or her family recognized as primary.

VOR has previously appeared before this Court as *amicus curiae* in cases, like this one, that have a direct and significant impact upon the care and treatment of the mentally retarded. See, *e.g.*, *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999); *Heller* v. *Doe*, 509 U.S. 312 (1993). VOR was also an *amicus curiae* in the court below. Pet. App. 5 n.2.

VOR is troubled by the decision below, in which the court of appeals substituted its own determination of the meaning of the consent decree at issue for the views of the district court. The district court's interpretation of the consent decree was, however, based upon input from numerous monitors, the wishes of the affected families, and decades of experience overseeing the management of the facilities at issue. Moreover, as an advocate for individual and family participation in treatment decisions, VOR is concerned that the effect of the opinion below, as the U.S. Attorney has suggested,

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, VOR states that no counsel for a party authored any part of this brief, and no person or entity other than VOR or its counsel made a monetary contribution to the preparation or submission of this brief.

will be to "unravel years of positive, non-abusive behavior" on the part of the petitioners, and undo the years of progress in Massachusetts for which the mentally retarded community and its families have struggled.

STATEMENT OF THE CASE

A. Background

This litigation began more than 35 years ago, when a class action was filed on behalf of the residents of the Belchertown State School, a state-run institutional facility for the mentally retarded. The complaint alleged that the conditions at these facilities were so inadequate as to deny the residents' due process rights to minimally adequate care, thus violating both federal and state statutes. Over the next three years, similar actions were filed on behalf of the residents of the Commonwealth's other residential facilities for the mentally retarded (Fernald, Wrentham, Dever, and Monson). *Ricci* v. *Okin*, 537 F. Supp. 817, 819 & n.4 (D. Mass. 1982) ("*Ricci I*"). These cases were consolidated before the district court (Tauro, J.).

Rather than litigating, the Governor and the Attorney General "concluded that 'the case would be indefensible.'" *Mass. Ass'n for Retarded Citizens* v. *King*, 668 F.2d 602, 604 (1st Cir. 1981). The Commonwealth thus joined with the plaintiffs, and, together with the district court, "devoted hundreds of hours of study, negotiation, and planning" with the goal of establishing, through interim consent decrees, minimum standards for the renovation of the facilities, staffing requirements, quality of services offered, retention of adequate personnel, and the availability of community residential facilities. *Ricci I*, 537 F. Supp. at 820; see also *Mass. Ass'n for*

Retarded Citizens v. *King*, 643 F.2d 899, 900 & n.1 (1st Cir. 1981).

During the course of the litigation, Judge Tauro repeatedly met with the parties, reviewed the level of the Commonwealth's compliance with the interim decrees, personally viewed the facilities, and sought input from other interested parties. *Ricci I*, 537 F. Supp. at 820-21. The court also enlisted assistance from state and federal officials, including the Secretary of the U.S. Department of Health and Human Services ("HHS") and at least four monitors, including the U.S. Attorney for the District of Massachusetts.

Even after a decade of efforts by the Commonwealth to achieve compliance, the Secretary of the HHS issued a report finding that "at every single institution there were substantive gaps between the promise of improvement and the reality of compliance with existing safety standards which are necessary to protect the residents." *Ricci* v. *Callahan*, 576 F. Supp. 415, 416 (D. Mass. 1983) ("*Ricci II*"). In light of that finding, the district court continued to meet with the parties, review surveys and investigations of state agencies, and monitor the Commonwealth's progress. See, *e.g.*, *Ricci* v. *Callahan*, 646 F. Supp. 378, 380 (D. Mass. 1986) ("*Ricci III*"); *Ricci* v. *Okin*, 781 F. Supp. 826, 827 (D. Mass. 1992) ("*Ricci IV*").

By 1993, conditions at the facilities had improved, and the district court was able to cede its oversight through issuance of a final consent decree (the "Disengagement Order"). The Disengagement Order authorized the court to reopen the case if the defendants (a) "substantially fail to provide a state

ISP[2] process in compliance with this Order"; (b) "systemic[ally] fail[] to provide ISP services required by this Order"; or (c) "are not in substantial compliance with this Order with regard to systemic issues." *Ricci* v. *Okin*, 823 F. Supp. 984, 988 (D. Mass 1993) ("*Ricci V*"); Pet. App. 48-79.

B. The Commonwealth's Plan To Close And Consolidate The State Schools

In budget acts passed from 2004 through 2007, the Massachusetts state legislature directed the Department of Mental Retardation ("DMR") to "consolidate or close" the Commonwealth's remaining institutional facilities, including Fernald. Pet. App. 6. These consolidations and/or closures were part of the Commonwealth's policy to "reduce[] its institutional capacity" in light of the "national trends toward deinstitutionalization." *Id.* at 7. The Commonwealth also justified the closings as being required by this Court's decision in *Olmstead* v. *L.C. ex rel Zimring*, 527 U.S. 581 (1999); see Pet. App. 6-7, a view disputed by both Petitioners and *Amicus*.

From 2003 to 2006, the Commonwealth gradually transferred 49 of the 238 Fernald residents to other residential institutions or into community residences. Pet. App. 8-9. In February 2006, the remaining Fernald residents sought an injunction prohibiting further transfers pending investigation. *Id.* at 9.

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[2] An "ISP" is an "Individual Service Plan" that "address[es] the individual's residential and programmatic needs . . . medical needs, physical needs, equipment needs, guardianship needs and habilitation needs as a whole." *Ricci IV*, 781 F. Supp. at 827 & n.4. The recommendations contained in the ISP "are based on evaluation of the actual needs of the resident or client rather than what facilities and programs are currently available." *Id.* at 827 n.4.

That motion was granted by Judge Tauro, who also appointed a monitor—the U.S. Attorney for the District of Massachusetts—to "investigate whether the DMR's past and prospective transfer of residents out of Fernald was in compliance with this court's 1993 Final Order, and applicable law." *Id.* at 35; *id.* at 46.

C. The Monitor's Report And The District Court's Reassertion Of Jurisdiction

After a year of investigation, the monitor found that the residents previously transferred by the DMR had obtained "equal or better" services at their new locations, but that the remaining "'Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an "equal or better" service outcome.'" Pet. App. 37-38. The district court agreed, finding that "the Commonwealth's stated global policy judgment that Fernald should be closed ha[d] damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to wholesale basis," as required by the ISP process. *Id.* at 39 (footnote omitted). Because the very purpose of the ISP process is to provide "an individual and personalized analysis" irrespective of the existence and availability of compliant facilities, the court found that "the declaration that Fernald will be closed . . . eviscerate[d] this opportunity for fully informed individualized oversight." *Id.* at 40. Thus, having found a "'systemic failure' to provide a compliant ISP process," the district court held that the Commonwealth had violated the Disengagement Order. *Id.* at 40-41. In reasserting jurisdiction on account of the violation, the court granted an injunction requiring that any communication from DMR regarding residential choices "shall include

Fernald among the options which residents and guardians may rank when expressing their preferences." *Id.* at 42.

D. The Commonwealth's Appeal

On appeal, the First Circuit held that "[t]he terms of the consent decree embodied in the Disengagement Order, like any contract construction issue, present an issue of law that we review de novo." Pet. App. 21 (citing *F.A.C., Inc.* v. *Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 (1st Cir. 2006)). Stating that "[o]ur view of the proper construction [of the consent decree] is different from the district court's," *ibid*, it concluded that "[t]his *individualized* process [the ISP requirement that each resident receive an individual evaluation of services that he or she requires]. . . cannot constitute a *systemic* failure." *Id.* at 27 (internal quotation marks omitted) *Ibid.* It therefore found the district court lacked jurisdiction to reopen and reversed. *Id.* at 28.

SUMMARY OF THE ARGUMENT

In applying a *de novo* standard of review, the court below exacerbated a well established split among the federal appellate courts on the appropriate standard of review of a district court's interpretation of its own consent decree. The Second, Sixth, Seventh, Ninth, and Tenth Circuits would have afforded substantial deference to the district court's ruling, in recognition of its extensive, and often more nuanced, understanding of the purpose and effect of the decree. Like the court below, the Third, Fifth, and D.C. Circuits apply a *de novo* standard of review, likening a consent decree to an unambiguous contract.

Amicus respectfully submits that the application of a *de novo* standard of review in the context of the case below is inappropriate. In applying a *de novo*

standard of review, the First Circuit seemingly gave no weight to the lower court's decades-long and fact-sensitive judicial intervention into the constitutionally required care of the mentally retarded. In treating the consent decrees incorporated in the Disengagement Order as everyday contracts, the court erred in two important ways. First, it substituted its own judgment for that of the district court on the interpretation of an order that was necessarily based upon the factual findings made by the very same district judge throughout this litigation. Second, it failed to recognize that even if a consent decree can be viewed as a contract between the parties, deference in interpreting that agreement should be accorded to the district court because "[o]ver time, the district court gains an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree." *Navarro-Ayala* v. *Hernandez-Colon*, 951 F.2d 1325, 1338 (1st Cir. 1991).

For those same reasons, deference should be shown to that same court when it interprets an order drafted by its own hand. Doing so is justified in light of the district court's intimate involvement in the litigation below, and because of the equitable nature of consent decrees, and will foster judicial economy.

For these reasons, *amicus* respectfully requests that the Court grant the petition for *certiorari*.

ARGUMENT

I. THE DECISION BELOW UNDERSCORES THE NEED FOR THIS COURT TO RESOLVE THE CIRCUIT SPLIT ON THE STANDARD OF REVIEW TO BE APPLIED TO A DISTRICT COURT'S INTERPRETATION OF ITS OWN CONSENT DECREE.

The decision below deepened a longstanding and acknowledged circuit split on the standard of review to be applied to a district court's interpretation of its consent decrees. See *F.A.C., Inc.* v. *Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 & n.4 (1st Cir. 2006) (recognizing disagreement between the Third, and Sixth Circuits on the appropriate standard of review); *Holland* v. *N.J. Dep't of Corr.*, 246 F.3d 267, 277-78 (3d Cir. 2001) (applying *de novo* review, but recognizing that the Second, Sixth, Seventh, and Ninth Circuits would have given deference to the district court); Childress & Davis, *Federal Standards of Review* § 2.23, at 2-141 (3d ed. 1999) (noting that while some circuits apply a *de novo* standard of review to a district court's interpretation of a consent decree "by analogy to the contract rule," others "seem to allow more discretion to the district court, at least when it is policing its domain").

As discussed in the petition and the brief of Wrentham, several circuits afford substantial deference to a district court's interpretation of its own consent decree, especially where, as here, the district court actively oversaw the litigation for a substantial period of time, or its interpretation was premised upon underlying factual findings made during the course of the litigation. See, *e.g.*, *South* v. *Rowe*, 759 F.2d 610, 613 n.4 (7th Cir. 1985) (where district judge oversaw litigation for significant period of time, "his interpretation of the decree will be reversed only for

an abuse of discretion"); *Huguley* v. *Gen. Motors Corp.*, 52 F.3d 1364, 1369 (6th Cir. 1995) (noting the "well established principle that a district court's interpretation of its consent decrees is entitled to substantial deference on appeal"); see also *Labor/Community Strategy Ctr.* v. *L.A. County Metro. Transp. Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001) (purporting to apply *de novo* review, but stating that "[w]e must '*give deference to the district court's interpretation* based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal.'") (emphasis added); *In re Application of City & County of Denver*, 935 F.2d 1143, 1147-48 (10th Cir. 1991) ("the district court's views on interpretation of a consent decree are entitled to deference") (internal quotation marks omitted); *Berger* v. *Heckler*, 771 F.2d 1556, 1558-59 & n.2 (2d Cir. 1985) (applying deferential review because of district judge's position in overseeing decree).

In conflict with these decisions, the First,[3] Third, and D.C. Circuits liken consent decrees to voluntary contractual arrangements and show no deference to the district court's interpretation. See, *e.g.*, Pet. App. 21; *United States* v. *W. Elec. Co.*, 907 F.2d 1205, 1209 (D.C. Cir. 1990); *Holland*, 246 F.3d at 278 ("adher[ing] to the long tradition in this Circuit of

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[3] In applying *de novo* review here, the First Circuit panel seems to have rejected *sub silentio* its previous suggestions that a more deferential standard should apply in public law litigation. *See Navarro-Ayala*, 951 F.2d at 1337-38 (suggesting deferential review is owed to a district court's "interpretation of broad, programmatic decrees entered into in public law litigation"); *Mass. Ass'n for Retarded Citizens*, 668 F.2d at 607-08 (same).

reviewing a district court's interpretation of a consent decree *de novo*").

Only review by this Court can restore order to this body of law. Moreover, resolution of this recurring issue is of paramount importance as the standard of review frequently is outcome determinative, yet infrequently the subject of careful analysis. See generally Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Seattle U. L. Rev. 11, 12 (1994) ("It would be difficult to name a significant legal precept that has been treated more cavalierly than standard of review."). Because this conflict cannot be resolved in the lower courts, and, as here, the choice of a particular standard of review will continue to lead to differing results in like cases, the writ should be granted.

II. THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS UNDERMINES THE ROLE OF THE DISTRICT COURT IN FORMULATING AND INTERPRETING THE CONSENT DECREE.

Application of a *de novo* standard of review to the interpretation of consent decrees conflicts with this Court's guidance on the appropriate standard of review where, as here, the trial court is acting in a supervisory capacity; it also ignores the historical deference paid to district courts acting in equity. The contract analogy invoked by the First Circuit also overlooks the unique role the district court played in supervising the events leading up to the consent decree. Unfortunately, these errors proved to be outcome determinative; even moderate deference to the district court's ruling would have led to a different result.

A. Deference Is Required Where A District Court's Interpretation Depends Upon The Perspective Acquired Through Its Long-Standing Supervision Of The Underlying Litigation.

This Court has acknowledged that where, as here, a statutory prescription is lacking, it may be "uncommonly difficult" to determine the appropriate standard of review. *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988). Nonetheless, touchstones exist for determining what standard is to apply. For example, this Court has recognized that "[i]t is especially common for issues involving what can broadly be labeled 'supervision of litigation' . . . to be given abuse-of-discretion review." *Id.* at 559 n.1; *accord Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 233 (1991). Indeed, the district court's enforcement of the Disengagement Order here epitomizes the concept of the "supervision of litigation" role, thus confirming that the First Circuit should have reviewed the order for abuse of discretion.

The district court found that the Commonwealth's determination to close Fernald interfered with its requirement to "adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." Pet. App. 39. Under the governing regulations, an ISP must be "based upon actual needs of the individual without regard to the availability of [the necessary] supports." 115 Mass. Code Regs. 6.23(1). Yet, based on its oversight of the litigation, the district court found that the Commonwealth's refusal to make such case-by-case determinations of the Fernald residents' "actual needs" meant that the Commonwealth's "administration of the ISP process amount[ed] to a 'systemic failure' to provide a compliant ISP process, within the meaning of the

Final Order." Pet. App. 40; see *Ricci V*, 823 F. Supp. at 988. Accordingly, having found a breach of the requirements of its Disengagement Order—itself the outgrowth of decades of successive consent decrees—the district court reasserted jurisdiction.

Thus, the question for review by the First Circuit was whether the district court correctly concluded that the DMR's refusal to allow Fernald residents to express a preference to remain at Fernald was a "'systemic failure' to provide a compliant ISP process" that would have allowed the district court to reopen the case. Pet. App. 40; *Ricci V*, 823 F. Supp. at 988. The operative condition for reopening did not stem from a statute, regulation, or precedent of a higher court. It was a standard formulated by the district court itself in 1993, based on its longstanding supervision of the litigation and its view about the circumstances in which further intervention by the court might be required. Thus, in exercising jurisdiction, the district court simply found that its own previously articulated standard had been satisfied, relying in significant part upon the year-long investigation of the U.S. Attorney. Pet. App. 34-40. See generally *Salve Regina Coll.*, 499 U.S. at 233 ("deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question"); *Pierce*, 487 U.S. at 559 n.1.

The First Circuit overlooked the role that the district court's supervision of the underlying litigation played in crafting the standards that would govern reengagement and in finding that those standards had been satisfied. Instead, characterizing the consent decree as a "contract," the appellate court stated that its "view of the proper construction [of the

consent decree] is different from the district court's." Pet. App. 21. However, the First Circuit never articulated precisely what "construction" of the Disengagement Order changed the outcome. Indeed, there was no disagreement between the First Circuit and the district court on the meaning of the word "systemic." Rather, the appeals court disagreed that the specific facts found by the district court amounted to a "systemic failure" within the meaning of the Disengagement Order, and thus substituted its view for that of the district court.

Assuming, as the First Circuit did, that the question presented was one of interpretation of the consent decree (as opposed to a finding of fact to be analyzed under a "clearly erroneous" standard),[4] the question of whether the Commonwealth's implementation of the ISP process was compliant (especially in light of the evidence of coercion and intimidation of the Fernald residents, see Wrentham Ass'n for Retarded Citizens Br. at 10-13 (filed Feb. 18, 2009)) is precisely the type of determination that a district court is uniquely qualified to make. See, *e.g.*, *Pierce*, 487 U.S. at 559-60 ("[W]ith regard to the problem of determining whether mixed questions of law and fact are to be treated as questions of law or of fact for purposes of appellate review, . . . sometimes the decision 'has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question'").

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[4] Notably, the Commonwealth argued below that "clearly erroneous" review applied to the district court's findings which triggered its decision to reopen. Appellant's Br. 30 & n.30, *Ricci* v. *Patrick* (1st Cir. Mar. 20, 2008) (No. 07-2522)..

A *de novo* standard of review also gives no weight to the judicial fact-finding implicit in the district court's interpretation of the consent decree and evaluation of its implementation. Reliance on the hypothetical analogy between a consent decree and a contract—despite the nature and history of the consent decrees at issue here—is to disregard the days of hearings, months of negotiations, years of review, and decades of oversight that informed the district court's analysis. See *Brown* v. *Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981) ("[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it"); *In re Application of City & County of Denver*, 935 F.2d at 1147-48 (giving deference to district court's interpretation of consent decree where trial judge interpreted and enforced two overlapping consent decrees in litigation over which he had presided for decades).

B. Deference Is Appropriate Because The Role Of The District Court In Interpreting The Decree Was An Exercise Of Its Equitable Powers.

Deferring to the district court when it formulates and interprets its own consent decree also is consistent with the discretion historically accorded to courts of equity. In that role, district courts have great latitude to act in the interests of justice. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944); see also, *e.g.*, *Brown* v. *Bd. of Educ.*, 349 U.S. 294, 300 (1955); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946).

Inextricably linked to that historical flexibility is a deferential standard of review. See *Meredith* v. *City of Winter Haven*, 320 U.S. 228, 235 (1943) ("An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determination of courts of equity."). Accordingly, when a district court interprets a consent decree in its role as a court of equity, deference to its rulings should necessarily follow. See Childress & Davis, *supra* § 2.23, at 2-141 (affording deference to a district court's interpretation of its own consent decree "makes sense, since the judge is acting in equity — traditionally discretionary — in enforcing his injunction"); *United States* v. *Am. Cyanamid Co.*, 719 F.2d 558, 564 (2d Cir. 1983) ("when the language of a consent decree provision is not clear on its face, a court of equity may, in construing the provision, consider the purpose of the provision in the overall context of the judgment at the time the judgment was entered").

C. In The Context Of This Litigation, The Analogy Of The Consent Decree To A Contract Is Misplaced.

In joining the other circuits that have applied a *de novo* standard of review to a district court's interpretation of a consent decree, the First Circuit relied upon the oft-used but imprecise analogy that the interpretation of a consent decree is "like any contract construction issue." Pet. App. 21. While it is true that consent decrees must be interpreted, when possible, by resort to the plain language of the agreement, see *United States* v. *Armour & Co.*, 402 U.S. 673, 681-82 (1971), that fact alone does not justify the analogy to between a consent decree and an ordinary contract. Particularly in cases where the district court is required to interpret a consent decree

it drafted, or the decree results from extensive judicial supervision, the principles of contract interpretation are only the starting point of the analysis.

The *sine qua non* of a contractual arrangement is that it is voluntary. See O.W. Holmes, *The Common Law* 302 (1881) ("As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary."). It is this underlying voluntary character of the obligations freely exchanged that justifies *de novo* review in the arena of contract interpretation. For when resort to the plain language of a contract does not definitively resolve a disputed issue, the reviewing trial court stands in no better situation than any other stranger to the contract to determine the precise scope of the parties' agreement. Accordingly, the trial court's views as to that meaning are not accorded deference in those cases.

But consent decrees are not the consequence of purely voluntary action. This Court has observed that "[w]hile [consent decrees] are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency." *United States* v. *ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975). The voluntariness of a consent decree, therefore, is impaired by the existence of a tribunal that will adjudicate the rights and obligations of the parties if no settlement is reached; moreover, the tribunal can refuse to approve or modify a consent decree, notwithstanding the parties' wishes. See, *e.g.*, *Williams* v. *City of New Orleans*, 729 F.2d 1554, 1559-60 (5th Cir. 1984) (en banc); *Am. Cyanamid Co.*, 719 F.2d at 565 ("[W]hile it is generally true that

contract law provides that parties to a contract may, by agreement, subsequently modify the contract without court approval, this is not the case with respect to consent decrees, since modification thereof always requires court approval due to their quasi-judicial nature") (citation omitted). Given its essential role in approving a consent decree, the district court is uniquely qualified to interpret and expound upon precisely what obligations were undertaken by the parties.

Moreover, far from being a mere bystander to the making of the parties' agreement, the court may be the prime mover in consummating an arrangement through either direct negotiation or *in terrorem* efforts to have the parties do so. See generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284, 1298-1300 (1976) (noting the breakdown of the traditional adversarial model in consent decree cases, and recognizing that "the judge is the dominant figure in organizing and guiding the case"). Judge Tauro's hands-on involvement deprives the consent decree and Disengagement Order here of any resemblance to an arms'-length transactions voluntarily entered into by the parties.

The lack of voluntariness, as well as the tripartite relationship inherent in the formation of consent decrees, both suggest that deference should be shown to the district court's interpretation. In the event of ambiguity regarding the decree's terms, the views of the court that approved the decree and oversaw the parties' negotiations are essentially extrinsic evidence that may properly be used in determining the decree's meaning. Cf. *ITT Cont'l Baking Co.*, 420 U.S. at 238 ("reliance upon certain aids to construction" is proper in determining the meaning of a

consent decree). Treating the district court's interpretation as extrinsic evidence as to the meaning of the decree (*i.e.*, with some deference) preserves the primacy of the parties' intentions as to the scope of the decree, while, at the same time, recognizing the district court's unique role as participant, facilitator, and adjudicator. See *Ricci I*, 537 F. Supp. at 824 ("the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication").

III. JUDICIAL EFFICIENCY ALSO SUPPORTS DEFERENTIAL REVIEW.

The application of a particular standard of review to specific categories of issues is, in part, a form of allocation of judicial resources. See Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. Kan. L. Rev. 1, 4 (1991) ("Standards of review serve to allocate decision-making responsibility among the various levels of courts in a hierarchical judicial system."). Affording deference to a district court's interpretation of a consent decree enhances judicial efficiency by recognizing the district court's unique role in the formulation of such agreements.

Generally, the application of a *de novo* standard of review in a particular case reflects a judgment that the correctness of a lower court's decision can be measured by an objective standard just as easily divined by an appellate court on a more limited record. While such a standard may be justified when it comes to interpreting a statute, a simple contract, or precedents from a higher court, that rationale fails in the institutional reform context in light of the myriad and nuanced issues that must be accounted for in overseeing the operation of public policy. Affording deference to the district court in such

circumstances is warranted because the lower court's day-to-day involvement simply provides a more reliable platform from which to view the questions in their proper context. See *Salve Regina Coll.*, 499 U.S. at 233; *Navarro-Ayala*, 951 F.2d at 1338; *Foufas* v. *Dru*, 319 F.3d 284, 286 (7th Cir. 2003) (district court judges' extensive involvement in overseeing consent decrees "may [provide them] insights into the meaning of the decree . . . that are denied to the appellate judges who review the judge's decision").

The need for deference is especially acute where, as here, the court is overseeing institutional reform litigation involving multiple facilities, numerous state and federal agencies, and hundreds of families. The sheer magnitude of input that Judge Tauro received from those involved, as well as the decades of experience in overseeing the litigation, all of which informed his decision below, cannot be summarized, let alone duplicated, by the appellate court on a limited record.

Moreover, deference to the district court in these circumstances will not override or undermine the appellate courts' responsibility to announce guiding principles of law for lower courts to follow. Especially in cases, like this one, involving exhaustive and detailed efforts to reform institutional facilities, appellate review serves little to no "instructive" value outside of this particular case. As this Court detailed in *Pierce*:

> One of the 'good' reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow

> facts that utterly resist generalization—at least, for the time being.

487 U.S. at 561-62. Due to the intricacies of the institutions often involved, varying procedural histories, the fact-specific nature of the wrongs to be remedied and the relief sought, the interpretation of consent decrees in institutional reform litigation presents precisely the situation where "the investment of appellate energy will . . . fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law." *Id.* at 561. Accordingly, the appellate court's function of clarifying the law to guide the prospective conduct of nonparties and providing uniformity of rules of decision is hardly implicated, let alone hindered.

IV. THE DECISION BELOW FAILED TO APPRECIATE *OLMSTEAD*.

In addition to the First Circuit's error in applying the wrong standard of review, *Amicus* is concerned that the decision below failed to recognize core principles of *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999), and thus may place disabled persons at risk of constitutional deprivation going forward. Below, the Commonwealth argued (and the First Circuit did not reject the notion) that allowing class members simply to *express* their desire to stay at Fernald would "run afoul" of *Olmstead*. Pet. App. 6, 42 n.16; see also Appellant's Br. at 29-30. The Commonwealth's erroneous interpretation of *Olmstead* as sword (forcing transfer to the community) rather than shield (prohibiting denial of appropriate community transfer requests) is, sadly, all too common.

In *Olmstead*, this Court reinforced the rights of individuals with mental retardation to choose the

residential setting that is most appropriate for each of those persons. 527 U.S. at 599-601. The decision challenged states to prevent and correct unjustified institutionalization, while endorsing the proposition that mentally retarded individuals and their families should be able to choose from an array of residential options. *Id.* at 601-02. The DMR and its *amici* below misinterpret *Olmstead* as support for the elimination of facility-based care. Based on its misreading of *Olmstead*, DMR successfully espoused the view that "deinstitutionalization is in the best interests of the Fernald residents," but ignored that some Fernald residents reject that view, and the monitor's conclusion that, for some Fernald residents, a transfer "could have devastating effects that unravel years of positive, non-abusive behavior." Pet. App. 4, 17 (internal quotation marks omitted) (quoting Monitor's Report).

Amicus agrees that community care can be an appropriate choice and supports the rights of those who desire to live in the community. *Amicus*, however, adamantly rejects the Commonwealth's apparent impression that *Olmstead* somehow suggests that institutional care is always inappropriate. See *Olmstead*, 527 U.S. at 601-02 (the ADA does not "condone[] termination of institutional settings"); see also *id.* at 605 (plurality op.) ("'Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be in an institution.'") (*quoting Amicus* Brief of Voice of the Retarded, *et al.*).[5] However, Justice Kennedy correctly observed

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[5] Indeed, the district court below recognized the need for both venues. *Ricci II*, 576 F. Supp. at 417-18 ("The fact is that there should have been both community and institutional programs

that the otherwise laudable goal of making community placement more readily available could have disastrous effects if applied in cookie-cutter fashion to the developmentally disabled community:

> It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act . . . to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision.

Id. at 610 (Kennedy, J., concurring in judgment). The Commonwealth's success below in convincing the court of appeals that community care can be foisted upon those who do not want it threatens *Olmstead*'s core and the intent and effect of the district court's consent decrees in this litigation.

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for the retarded. Title XIX and the consent decrees permit such an approach.").

CONCLUSION

For the foregoing reasons and those stated in this petition, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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